AIR PRIORITY RESTRICTED-Security Information

FOREIGN SERVICE DESPATCH

FROM: USPOLAD, Tokyo

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Desp. No.

TO: The Department of State, Washington

December 7, 1951
Date

REF: Mistel 1178, December 1, 1951

SUBJECT: Informal Discussions Begun on FCN Treaty With Japan

Officials of the Ministry of Foreign Affairs met with Mission officers on December 4, 1951 for the first of the informal and exploratory talks requested by the form in connection with the Department's standard draft for an FCN Treaty. Mr. Morio YUKAWA, Chief of the International Economic Affairs Bureau, and three of his assistants represented the Ministry of Foreign Affairs, and Mr. Dudley G. SINGER, Commercial Attaché, Mr. Jules BASSIN, Legal Attaché, and Mr. Robert W. ADAMS, Second Secretary, attended on behalf of the Mission.

Mr. Yukawa stated that these discussions were frankly exploratory, and that his main purpose was to seek to understand the precise meaning of terms employed in the U.S. draft which had puzzled Ministry officials. Mr. Yukawa indicated that he believed that there were but few points in question which could not be resolved either by slight changes in phraseology more easily translatable into Japanese or by a definition on our part of some of the terms employed in the model treaty. As the Mission anticipated, many of the positions put by the Japanese arose from their misunderstanding of words and phrases used in the model. One of the Japanese, for example, in supporting his proposal that Article I of the draft be deleted, held that "equitable treatment" is a new concept in addition to the established terms of national and most-favored-nation treatment.

There is enclosed a copy of the Ministry's notes on the Preamble and the first five Articles of the draft treaty which were discussed at the December 4 meeting. Mr. Yukawa stated that this paper represented the views and questions of all sections of the Ministry of Foreign Affairs. He added that no other Government ministry has been consulted up to this point since his Ministry wished to be well versed in the matter of exact definitions before approaching other Government agencies for their views.

Mr. Yukawa expressed the hope that the proposed treaty would not provide for the continuation of any of the "abnormal Occupation conditions" or extraordinary privileges presently enjoyed by foreigners in Japan. He was advised, of course, that there was no such intention.

Many of the questions raised in the enclosed Japanese paper were satisfactorily answered during the discussion. The remaining questions, on which the Department's assistance will be appreciated, and the tentative suggestions made by the Japanese for changes in wording are as follows:

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DEPARTMENT OF STATE L/T DEC 28 1951 TREATY BRANCH OFFICE OF THE LEGAL ADVISER

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Preamble to U.S. Model Treaty:

1. The Japanese - who believe that greater emphasis should be placed on commercial intercourse than on investment - suggest that the present phrase be inverted to read "promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments".

2. Believing that the phrase "otherwise establishing" may be interpreted to mean measures beyond those specifically outlined in the model treaty, the Japanese prefer to delete the word "otherwise", or amend the phrase to read "establishing other mutual rights and privileges".

3. The third point in the Japanese paper was apparently explained to their satisfaction. They agreed that Japan will accord national as well as MFN treatment unconditionally, but declared that they had never encountered in international agreements any phrase implying unconditional national treatment. It might be helpful if alternative phraseology were available to offer the Japanese.

Article I:

That somewhat obscure point raised under this heading in the Japanese paper was apparently explained to the satisfaction of the Ministry's representatives. They declared, however, that they find it very difficult to translate "equitable" into Japanese, but have promised to seek a definition understandable to other Government agencies.

Article II:

The Japanese proposal for a statement on MFN treatment regarding entry and basic personal rights is based on the fact that a similar statement is contained in Article I, paragraph 3, of the treaty with Italy. Although the Mission representatives pointed out that such an expression was not needed in this instance, it would be helpful if the Department would inform the Mission of the reason for its inclusion in the treaty with Italy.

Article III:

1. The change from "molestations" to "unlawful molestations" is suggested by the Japanese because of its greater clarity, and the fact that the latter phrase is employed in the treaties with Israel, Ireland, Greece, and Denmark.

2. The Japanese paper points out that the extension of national treatment (in the accord of protection and security) is preferred to the model treaty phrase ("in no case less than that required by international law") since the latter is considered ambiguous. The Japanese also pointed out that their suggested change was embodied in the treaty with Colombia.

3. The addition of the phrase "is accused of crime" was suggested by the Japanese because they felt that notification to a consul upon the mere placing in custody of an individual would be burdensome. It was pointed out to the

Japanese that their laws permit the detention of an individual for a period of up to 23 days without the bringing of definite charges. The Japanese promised to look further into this matter, and it is believed that they will withdraw their proposed change.

Article IV:

1. The various questions raised by the Japanese, as outlined in the enclosed paper, were based on their erroneous impression that social security embraced Federal and State relief systems. Mr. Tukuma declared that the Ministry is in full agreement that social security benefits are to be accorded foreigners in Japan.

2. It is believed that local files contain enough information on United States social security programs to furnish the Japanese with the data they request.

3. The Japanese would like to receive an answer to their question regarding the treaty with Denmark, with particular reference to the reasons that social security benefits are limited in the treaty with Denmark, and are on a voluntary insurance basis.

Article V:

1. In connection with the mutual guarantee of enforcement of an arbitration award, the Japanese propose the additional phrase "as long as it is not contrary to public order and good morals". They declare that this limitation is consistent with their laws, and, furthermore, that it is employed in the treaty with Greece.

2. The Japanese generally employ the word "tribunal" to define a body with judicial or quasi-judicial powers, and point out that their Constitution prohibits the establishment of such extraordinary tribunals. In view of the difficulties in translating this word in such a manner as to make clear that it does not represent the tribunals banned under the Constitution, the Japanese propose its deletion. They believe that the phrase "administrative agencies" (instead of "administrative tribunals and agencies") suffices, and would prefer to employ the shorter phrase.

3. The Japanese believe that the mutual guarantee of enforcement of awards is far more strongly and conclusively stated in the treaty with Greece (Article VI, paragraph 2, last two sentences) than in the standard draft treaty. They appear to prefer the wording employed in the treaty with Greece, and have requested a reply from the Mission as to the reason for the phraseology in that treaty. The Department's advice on this point will be appreciated.

The next meeting with the Japanese is scheduled for December 7, and it is hoped that the first round of informal and exploratory talks will be completed by December 15. The Mission proposes to transmit to the Department the proposals and queries of the Japanese as they are presented.

The Japanese are making careful comparisons, and noting differences, between the provisions of the standard draft and the related provisions in the FCN treaties negotiated by the U.S. and other countries. There seems to be some concern on their part that the standard draft is not actually "standard", but has been prepared particularly for Japan. The Mission's representatives reiterated to the Japanese that this is a standard draft for this type of treaty, drafted on the basis of previous experience, that the Department would propose to use as a basis for negotiations with any other country seeking such a treaty with the United States.

In order that full clarification of the various points raised may be furnished as rapidly as possible, it will be appreciated if the Department will transmit the requested information at its earliest convenience.

For the Political Adviser:

BEST COPY AVAILABLE

Peyton Kerr
Peyton Kerr
First Secretary of Mission

Enclosure:

Japanese Ministry of Foreign Affairs'
Notes and Questions on U.S. Model
FCN Treaty.

RESTRICTED - Security Information
(Classification)
COPY

Preamble

(1.) The phrase "arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse" should be amended as follows, "arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments".

(2.) "otherwise establishing mutual rights and privileges" -- This phrase does not specify any reference to the provisions in the articles of the present treaty. A better formula is desired to be worked out and be substituted therefor.

(3.) The phrase "principles of national and of most-favored-nation treatment unconditionally accorded" is likely to be interpreted that both national treatment and most-favored-nation treatment should be accorded unconditionally. To avoid this possible misinterpretation, this phrase should be amended as follows, "principles of national and of unconditional most-favored-nation treatment".

Article I (General Equitable Treatment)

The body of the treaty should include only such articles as prescribing the definite rights and obligations of the Parties.

Therefore, it is deemed inappropriate to put in a provision which introduces a new concept of general equitable treatment, the concrete application of which has not yet been established in the international law, besides the internationally established concepts of national treatment and most-favored-nation treatment.

Such new concept will not only add ambiguity to the rights and obligations provided for in the treaty, but also, it is feared, may be a cause for controversy in applying this article and other articles in specific cases.

For the above reason, Article I should be deleted.

Article II (Entry and Basic Personal Rights)

The following provision should be added between paragraphs 2 and 3 of Article II.

Nationals of either party shall be accorded most-favored-nation treatment with respect to the matters referred to in paragraphs 1 and 2 of this Article.

Reason: In view of the basic principles of this Treaty stated in the Preamble, it is deemed proper to guarantee most-favored-nation treatment with respect to the matters prescribed in paragraphs 1 and 2 of this Article.

Questionnaire:

(a) What sorts of activities are to be involved in the "related commercial activities"?

Is the above-cited "Commercial activities" being used to have the

same meaning as the "commercial activities" as stipulated in Article VII, paragraph 1? If not, in what aspects does one differ from the other?

(b) Will the nationals of either Party be permitted to enter the territories of the other party as the employees engaging in the "related commercial activities"? If so, what will be the scope of the said "employees"?

Article III (Protection of Persons)

(1) Paragraph 1 of Article III should be amended as follows:

Nationals of either Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security within the territories of the other Party. Such protection and security shall in no case be less than that accorded, in like circumstances and conditions, to nationals of such other Party.

Reason: The phrase "protection and security, in no case less that that required by international law" is ambiguous and therefore, the use of such a phrase will be a cause for future controversy.

(2) Paragraph 2 of Article III.

"————is taken into custody" should be amended to "————is accused of crime and taken into custody."

Reason: The meaning of the provision will become much clearer.

Article IV (Workmen's Compensation and Social Security)

Article IV, paragraph 2 provides for national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of the supporter. It is suggested that national treatment be limited to the application of laws and regulations establishing the insurance system, under which the insured is required to pay premium or consideration. In case where laws and regulations provide for the voluntary collective insurance system (Article 14 of the Health Insurance Law and Article 6 of the Unemployment Insurance Law), national treatment should be extended to the application of them.

Questionnaires:

(1.) Request detailed information by illustration of the compensation system under the Federal or States Laws and regulations for disease, injury or death arising out of and in the course of employment or due to the nature of employment.

What is meant by the phrase "on account of disease, injury, or death arising out of and in the course of employment or due to the nature of employment"?

(2.) Request information as to whether or not the following is included in the social security system under the Federal or States laws and regulations:

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the pension or the retirement allowance system under which benefits are paid to those public servants who retired after serving the office for a certain specified period.

(3) Why is it that in the FCN Treaty between the U.S. and Denmark, national treatment is extended to the application of laws and regulations establishing a system of compulsory insurance in the case of the U.S. and a system of voluntary insurance in the case of the Kingdom of Denmark. Further, why in the above treaty is national treatment only extended to the laws and regulations establishing a system, under which benefits are paid against loss of wages or earning due to unemployment, without extending national treatment to loss of wages or earning due to old age, sickness or disability?

(4) Request clarification of the scope covered by the term "compulsory system of social security". Is it proper to understand that the relief system such as the public assistance to the helpless or to the children's welfare where the expenses are all paid out of the appropriation of the central government or the local governments is not included in the "compulsory system or social security."

Article V (Judicial Rights and Commercial Arbitration)

(1) Paragraph 2.

It is suggested that a provision be included in paragraph 2 for the mutual guarantee of the enforcement of an arbitration award by the parties as long as it is not contrary to public order and good morals of the parties concerned, as in the case of the FCN Treaty between U.S. and Greece.

Questionnaire:

(a) Request the definition of the term "domestication", together with clarification of the differences of such terms:

"domestication", "registration", mutual recognition of companies or establishment of branch offices or agents, and organization by nationals of either Party of a company within the territories of the other Party or acquisition of the status of a resident therein.

(b) Does the term "administrative tribunal" mean administrative courts with jurisdiction independent of the judicial courts, or does it mean the administrative agencies whose judgment is subject to review by the judicial courts?

Under the Constitution of Japan, establishment of the former categories of courts is prohibited. Are there such administrative tribunals under the Federal or State Constitutions?

(c) On what ground is the provision for the guarantee of the enforcement of an arbitration award included only in the FCN Treaty between the U.S. and Greece.

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